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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 181

KAM KOON WAN, on His Own Behalf and on Behalf of All Other Persons and Employees of Defendant Who Are Similarly Situated,
Petitioners,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit.

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To the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on April 13, 1951.

OPINIONS BELOW.

The ruling of the District Court for the Territory of Hawaii rendering partial summary judgment (R. 35-66) is reported in 75 F. Supp. 553. The opinion of the District

Court (R. 76-86), ruling on coverage under the Fair Labor Standards Act of the work performed, is not reported. The opinion of the Court of Appeals dismissing the first appeal is reported at 182 F. 2d 146. The opinion of the Court of Appeals for the Ninth Circuit (R. 198) affirming judgment of the District Court is reported in 188 F. 2d 558.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 13, 1951 (R. 209). The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254 (1).

The petition for a Writ of Certiorari is filed by petitioners, plaintiffs in a civil suit, for unpaid overtime compensation, and liquidated damages, under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Sec. 201 et seq. Petition is filed after rendition of judgment in the Court of Appeals for the Ninth Circuit on April 13, 1951.

The validity of the judgment, which is based upon the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Sec. 251 et seq., as well as the Fair Labor Standards Act of 1938, is drawn in question upon the ground that said Portal-to-Portal Act of 1947 is erroneously construed and applied to the facts of this case, as set forth in the judgment, and as construed in the opinion of the Court of Appeals for the Ninth Circuit, and it is further drawn in question on the ground that Section 9 of said Portal-to-Portal Act of 1947, as construed and applied, is repugnant to the Fifth Amendment to the United States Constitution, in that it deprives petitioners of rights without due process of law.

QUESTION PRESENTED.

Whether respondent has pleaded and proved that its failure to pay overtime compensation for the period claimed was in good faith in conformity with and reliance on an administrative order of an agency of the United States.

STATUTES INVOLVED.

The pertinent federal statutory provisions are as follows:

Fair Labor Standards Act of 1938, 29 U. S. C.—

"Sec. 207. Maximum hours.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"Sec. 216. Penalties; civil and criminal liability * * *

"(b) Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable

to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * * ''

Portal-to-Portal Act of 1947, 29 U. S. C., Sec. 258—

''Sec. 9. **Reliance on Past Administrative Rulings, Etc.**—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.''

STATEMENT.

This is a petition for writ of certiorari to review a judgment of the Court of Appeals which affirmed the final judgment of the District Court of the United States for the Territory of Hawaii, said judgment denying recovery for overtime wages alleged to be unpaid for work performed between December 7th, 1941, and November 10th, 1943, and for work performed on some projects from November 15th, 1939, to December 7th, 1941 (R. 89). Judgment was entered for petitioners for overtime work performed by them on the remainder of the projects during the latter period.

The petitioners (312 in number) started the action to recover overtime benefits provided for under the Fair Labor Standards Act of 1938 (hereinafter referred to as "the Act"), 29 U. S. C., Sec. 216 (b), for the period beginning six years prior to November 14, 1945 (R. 2-7, 187-192).

The petitioners were employees of the respondent and were engaged by it in work necessary to interstate commerce (R. 3). Respondent was engaged in a general construction business, having contracts with private individuals, the city and county of Honolulu, the Territory of Hawaii, and the United States Government (R. 3). Eighty percent of respondent's work from December 7, 1941, to November 10, 1943, was upon government contracts (R. 25).

On December 7, 1941, Hawaii was placed under martial law (Hawaiian Organic Act, Par. 67, 31 Stat. 153 [1900], 48 U. S. C., Sec. 532), which was terminated by Presidential Proclamation on October 19, 1944. On December 20, 1941, the Military Governor issued General Order No. 38, which froze all wage rates as of December 7, 1941, froze

employees of all government agencies and government contractors to their jobs, set the work day at eight hours, and ordered work performed in excess of eight hours to be paid at the rate of one and one-half times the regular rate (Appendix I, infra).

General Order No. 91 was promulgated March 31, 1942, and revoked Order No. 38. It contained the following important clause: "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act" (R. 62; Appendix II, infra).

General Order No. 91 also designated revised Wage Schedule No. 9 as the standard wage scale for workers engaged in work for Army and Navy agencies, their contractors and sub-contractors (Appendix III, infra). Overtime at one and one-half times the regular rate was authorized to be paid for work in excess of eight hours per day. Federal, territorial, city and county civil service employees were exempt from Wage Schedule No. 9 as well as the hours of work and overtime regulations. The order also provided for manpower controls.

Respondent moved for summary judgment, taking the position that its failure to comply with the requirements of overtime pay during the period in question resulted from the above military orders.

(It was agreed that the respondent paid petitioners at one and one-half times the regular rate for all work performed in excess of forty hours per week, subsequent to November 10, 1943.)

Summary judgment was entered for the period December 7, 1941, to November 10, 1943, on the ground that respondent had established a good-faith defense under Section 9 of the Portal-to-Portal Act of 1947 (R. 87).

The basis of the decision was that respondent was a contractor and sub-contractor with the federal government and was subject to the Military Orders (R. 25); that respondent was obliged under military orders to pay the overtime compensation prescribed therein; and that respondent in good faith and in reliance upon said Orders paid overtime pay in strict conformity with the Military Orders; that respondent's employees were in a labor pool under control of military authorities, and that respondent was obliged to obey the commands of the military authorities with respect to the payment of wages, hourly rates, and overtime; and the respondent at all times and in all respects, in good faith, followed the Military Orders (R. 27).

"The situation was one of military dictatorship and one did as ordered to do. * * * What defendant knew, thought, or believed was immaterial. The constitution and federal territorial law was cast aside, and the defendant and all other persons in Hawaii were told by Military Order what to do and theirs was not to question or reason why" (R. 45).

There was no evidence of any inquiry or any other affirmative action taken by respondent as to whether it had to comply with the body of Military Orders or the Act. The District Court took judicial notice of the Military Orders and the existence of martial law in the territory (R. 36-39).

For the period November 14, 1939, to December 7, 1941, the parties entered into a stipulation setting forth the nature of the work performed by the petitioners (R. 69-76). The District Court held that work on those projects performed by petitioners for the federal government with the exception of the federal post office in Hilo, Hawaii, was not within the scope of the Act, because it was work for

the government upon a military reservation, and was substantially all new construction. Of the work performed for the territorial government or private industry, the District Court held that certain of those jobs were not covered by the Act because they were new construction and work for the government on reservations (R. 85-86), and other projects were purely of a local operation, unrelated to commerce or the production of goods for commerce (R. 85-86).

The balance of the projects for the period 1939 to 1941 were found to be covered by the Act. And it was found that for these latter projects the respondent did not pay overtime compensation in compliance with the Act. Judgment covering such projects was entered for the petitioners accordingly, and is not a subject of this petition.

On appeal to the Court of Appeals for the Ninth Circuit, judgment was affirmed (R. 209).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Ninth Circuit erred:

1. In holding that alleged fear of military sanctions under the circumstances of this case constituted a good-faith defense under Section 9 of the Portal-to-Portal Act of 1947.

2. In holding that respondent was bound on threat of force to obey General Order No. 91 issued by the Military Governor, although the order itself specifically exempted those employments covered by the Fair Labor Standards Act.

3. In granting in part the motion for summary judgment based on Section 9 of the Portal-to-Portal Act of 1947 (61 Stat. 88; 29 U. S. C., Sec. 258), because the affidavits filed

by respondent were sufficient "proof" within the meaning of Section 9 of said Act.

4. In holding that the order of the Military Governor was a "regulation, order, ruling, approval, or interpretation" of any agency of the United States within the meaning of Section 9 of the Portal-to-Portal Act.*

5. In holding that Section 9 of the Portal-to-Portal Act of 1947 was not in violation of the Fifth Amendment of the United States Constitution.*

6. In ruling that certain of the work performed by the petitioners for the respondent before December 7, 1941, was not within the scope of the Fair Labor Standards Act.*

REASONS FOR GRANTING THE WRIT.

I.

Fear of Military Sanctions Under the Circumstances Herein Does Not Constitute a Good-Faith Defense.

A. The decisions below destroy claims of thousands of workingmen.

The decisions herein by the courts below in effect destroy all claims for overtime benefits by employees for work performed in the Hawaiian Islands during the period December 7, 1941, to November 10, 1943, where such persons were engaged in work for contractors or sub-contractors of Army and Navy agencies. The courts below have made a blanket ruling that the Military Orders constituted a good-faith defense for non-compliance with the Fair Labor Standards Act merely because those Orders were promulgated by the military who had a reputation

* Items 4, 5 and 6 of Specification of Errors to be Urged will be raised if certiorari is granted.

for "rapid-fire convictions * * * often irrespective of guilt and the law * * *" (R. 45).

Presently there are twelve other cases pending in the District Court for the Territory of Hawaii based upon overtime violations of the Act covering the same period of time as the instant case. All these cases involve the same question: whether the issuance of the Military Orders serve as a basis for a good-faith defense. Including the instant case, there are more than 8,000 persons plaintiff.

B. Respondent's defense is not "good-faith" defense under statute.

Respondent has failed to show that its omission to pay overtime pursuant to the federal law was in good faith, in conformity with, and in reliance on an order of an administrative agency, within the meaning of Section 9 of the Portal-to-Portal Act. The trial court described the situation as "one of military dictatorship and one did as ordered to do" (R. 45).

The conduct of the respondent here in complying with what it thought was the substance of the Military Order does not square with any of the opinions or Congressional debate discussing the matter of good faith. **Statement of Senator McGrath, 93 Cong. Record, Part II, page 2255; Statement of Congressman Gwynne, 93 Cong. Record, Part II, page 1941; Statement of Congressman Walter, 93 Cong. Record, Part IV, 4390; Burke v. Mesta Machine Co.**, 79 F. Supp. 588; **Bauler v. Pressed Steel Car Co.**, 81 F. Supp. 172, 176; **Ferrer v. Waterman Steamship Corp.**, 84 F. Supp. 680; **Interpretive Bulletin of the Administrator of Wage and Hour Division**, dated November 18, 1946, Section 790.15, 12 F. R. 7662; **Cochran v. Fox Chase Bank**, 209 Pa. 34, 58 A. 117; **Siano v. Helvering**, 13 F. Supp. 776, 780; **Colket v. St. Louis Union Trust Company**, 52 F. 2d 390, 391.

These cases describe "good faith" as depending substantially upon this objective test: Did the employer innocently follow the advice given him by a governmental agency without notice that such an interpretation was erroneous or invalid?

From a reading of these authorities it is clear that the "good-faith" defense was intended to protect the employer who had inquired of an administrative agency whether the Wage and Hour law applied to him, and who, after he was told that it did not, subsequently discovered that his employees were in fact or law actually covered by the Act. The theory of such defense is that if the employer had done whatever a prudent man would have done under the circumstances, that is, inquire as to the applicability of the law, he was not to suffer any sanctions for relying in good faith on the results of such inquiry.

There is nothing in this record to show that the employer made inquiries of any governmental agency to determine if it was bound by the military orders or the Fair Labor Standards Act.

The good-faith defense was not intended to protect the employer, who, as here, for a period of years violated the law (R. 89) and then attempted to seek the benefit of a doubtful order.

Nor can it be said that the order was relied on since, by its very terms, it provided that the Act superseded it, and put the employer on notice to make further inquiry. Having failed to ask for a ruling from any competent authority, respondents did not act in good faith.

The record of proceedings herein shows clearly that respondent did not act in good faith in conformity with, and in reliance on the order of the Military Governor. The orders ostensibly relied upon were not clearcut

directives. Respondent failed to comply with the Act prior to the promulgation of the military orders (R. 89). Respondent failed to ask for a ruling of any administrative agency on how the orders affected its employees. All these obstacles stand athwart respondent's goal to prove a good-faith defense. The remedial purposes of the Fair Labor Standards Act may not be frustrated so readily.

II.

The Military Orders Do Not Provide a Good-Faith Defense Under the Portal-to-Portal Act of 1947 as Applied to the Undisputed Facts of This Case Because the Orders Exempted Employments Covered by the Fair Labor Standards Act.

Petitioners' wage claims for the period December 7th, 1941, to November 10, 1943, were denied by the lower courts for the reason that the respondent had "no freedom of choice" (R. 45), and that respondent was "clearly subject to the orders of the Military Governo prescribing overtime compensation for work performed on Army and Navy projects. Violations of Military Orders were punishable by a military tribunal as it saw fit" (R. 204).

These Orders referred to by the court (General Orders Nos. 38 and 91, R. 59, 62; Appendices I and II, infra) established policies governing wages, hours, overtime, and the use of labor in the territory. Order No. 91, Section 2, dated March 31, 1942, provided, "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act."

The court below held that, "In the circumstances we regard the quoted provision as nothing more than a determination by fiat that employers such as appellee 'could safely disregard the provisions of that Act' " (R. 204).

It is submitted that the courts below erred in applying the Military Order when petitioners worked on jobs to which the Act applied. The purpose of the quoted clause was to except jobs covered by the Act from the ambit of the order, and put employers on notice that the Wage and Hour Law was still supreme.

That the order was not a determination by fiat is seen from an analysis of the excluding clause. If this were a rule by fiat, the words "as superseding" would not have been included. If the Military Governor intended that all contractors, regardless of the nature of the activity engaged in, should obey the order, the order would specifically have so stated; or it would have been silent as to the Act, in order to compel obedience to the order, even though the order was "probably unlawful."

Even though the clause "Nothing herein * * *" had not been included in the order, the application of the Fair Labor Standards Act would nevertheless have been compatible with the Military Orders. Payment in compliance with the Act would still be consistent with the payment of overtime after eight hours in one day, as provided in the Orders, which set forth minimum conditions.

It is possible to determine the wage requirements, both under the Orders and the Act, and then apply the requirements of the Fair Labor Standards Act thus satisfying both the Act and the Military Orders. **Powell v. United States Cartridge Co.**, 339 U. S. 497, at 519.

The Military Orders are also consistent with the purpose of martial law, which is to see that the laws are faithfully executed: "The governor shall be responsible for the faithful execution of the laws of the United States * * * ." Hawaiian Organic Act, 31 Stat. 153, 48 U. S. C., Sec. 532.

In fulfillment of this purpose, the "Nothing herein * * *" clause was included in the order so that the law

would take precedence. Thus, at least for the period during which Order #91 was in effect, the Act controlled.

Not only does the Hawaiian Organic Act impose the obligation upon the Governor for the faithful execution of the laws of the United States, but the Federal Constitution imposes a similar responsibility upon the President of the United States as well. Article II, Section 3, Constitution of the United States. Hence, there was a twofold charge upon the military to carry out the civil law, and the presumption is that the Military Governor was carrying out that duty.

All authority of the Army or Navy is derived through the President from the Constitution, and neither can go beyond the authority of the President or the legislation of Congress. **Ex Parte Milligan**, 4 Wall. (U. S.) 2, 141, 18 L. Ed. 281, 302.

Before the war there was no limitation on the number of hours which generally could be worked, but as to work covered by the Act, extra hours were made more burdensome for the employer by the overtime compensation provisions. The purpose of General Orders 38 and 91 was to apply the principles of the Act to employers and projects which did not involve interstate commerce, and to prohibit employers from taking advantage of the duress of the war emergency to work their employees unlimited hours without adequate compensation or rest. Thus, an examination of the order as a whole indicates that its purpose was to fix maximum limitations on hours of employment for all employees, and to fix minimum wage conditions for those not already protected by the Act, rather than to undermine existing protections afforded by the Act.

That the civil law has superior weight and that defendant was not bound on threat or force to obey the Military Orders is demonstrated by the case of **Duncan v.**

Kahanamoku, 327 U. S. 304, wherein reference was made to the established principle that "The laws shall alone govern; and to it the military must always yield." **Dow v. Johnson,** 100 U. S. 158, 169.

The decisions of the lower courts herein would deny this principle. They would impose an interpretation of the Military Order that was not intended by its author, and as a result of this error would place the military rule above the civil law.

Consistent with the interpretation that the Military Orders did not apply to work coming under the Fair Labor Standards Act, and did not preclude payment for overtime in accordance with that Act, is the fact that Wage Schedule No. 9, mentioned in the Orders, had a reference that "classifications listed under 40 hour week basis are those subject to Fair Labor Standards Act of 1938, which provides for payment on a 40 hour week basis instead of 44 hour week basis" (Appendix III, infra).

Thus implementing the language of the Military Order providing that it should not supersede the Federal Law, the wage schedule as well provided for payment pursuant to the law. On the other hand, there was no affirmative restriction placed upon compliance with the Federal Statute, either in the Orders or in Wage Schedule No. 9 incorporated therein.

III.

The Affidavits Filed by Respondent Were Not Sufficient "Proof" Within the Meaning of Section 9 of the Portal-to-Portal Act of 1947.

What is meant by good faith has hitherto been discussed. To ascertain proof of the ultimate fact of good faith, there must be an investigation by the court into all the facts. An affidavit, even undenied, is insufficient.

The burden of proof is placed specifically upon the respondent and must be sustained by him with respect to each element of the statutory defense. **Jackson v. Northwest Airlines, Inc.**, 76 F. Supp. 121, 125; **Burke v. Mesta Machine Co.**, supra; **Ferrer v. Waterman Steamship Corp.**, supra; 93 Cong. Record 4451, 4452.

There is nothing in the record which meets the objective test to show that respondent pleaded and proved good faith. Respondent's proofs do not show any investigation or inquiry concerning applicability of the orders, nor any instructions to clerks, or mechanics, by which the order was relayed to payroll clerks.

Before the Federal Rules of Civil Procedure were established, the rule was that summary judgment was improper when a statute required "proof" and the judgment was supported only by pleadings and affidavits. **United States v. Lindholm**, 79 F. 2d 784; **United States v. Stevenson**, 79 F. 2d 788.

In cases involving Section 9 of the Portal-to-Portal Act, it has also been held that the issue of good faith should be determined only upon consideration of all the evidence. **Divens v. Hazeltine Electronics Corp.**, 79 F. Supp. 513; **Camiano v. Rifkin**, 77 F. Supp. 363; **Sheppard v. American Dredging Co.**, 77 F. Supp. 73.

If Section 9 of the Portal-to-Portal Act of 1947 is to be properly construed, proof thereunder should be held to be established only after the defense has been exposed to the light of a full trial, with appraisal of all the facts and circumstances surrounding the good-faith reliance.

CONCLUSION.

The judgments of the courts below place the military orders in a position of supremacy, contrary both to the statute authorizing the martial law, and the Federal Con-

stitution, and thereby result in substituting government by men for a government by law. Accordingly, during time of emergency, civil laws enacted for the benefit of the people may be wiped out by the pretext of a doubtful military order, issued by one military general.

The decision of the courts below is a serious hindrance to the effective administration of the Fair Labor Standards Act as applied to the rights of more than 8000 employees who have filed claims for work performed on the Islands during the period of martial law. This case, therefore, is one of profound importance, and it is urgent that an early and definitive ruling be made by the Supreme Court. **United States v. Standard Oil Co.**, 332 U. S. 301, 302; note 2; **United States v. Powell**, 330 U. S. 238, 240.

For the foregoing reasons, it is submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX I.

TERRITORY OF HAWAII.

Office of the Military Governor.

Fort Shafter, T. H.

(General Orders No. 38.) 20 December, 1941.

The following policy governing the employment and use of labor in the Territory of Hawaii is announced for the information and guidance of all concerned:

1. All wage rates to be frozen as of December 7, 1941, for all employees on the Island of Oahu, so long as they remain in the same classification.

2. All employees of Federal Government and its contractors now actively deriving support from Federal funds, to be frozen to their respective employer as of December 7, 1941. This is to include the City and County of Honolulu, Territorial agencies, their contractors and subcontractors and utilities and sources of supply controlled by the Army and Navy. All the above workers who have separated from their employment since December 7, 1941, are to return to the job held as of that date.

3. Army and Navy will continue their established agencies for recruiting directly the workers required for their respective activities.

4. The normal working day shall be 8 hours, and all hours worked in excess of 8 hours will be paid at the rate of 1½ times the regular rate.

5. Terms of labor contracts between individuals and contractors, and other agencies of the Federal Government,

which restrict or specify the nature of work to be performed are hereby suspended.

6. Men employed hereafter must report to the job for which they are ordered by the Military Governor.

By order of the Military Governor:

/s/ Thomas H. Green,
Lt. Col., J. A. G. D., Executive.

APPENDIX II.

TERRITORY OF HAWAII.

Office of the Military Governor.

Iolani Palace.

Honolulu, T. H.

(General Orders No. 91.) 31 March, 1942.

Labor.—1. General Orders No. 38, Office of the Military Governor, 20 December, 1941, is revoked as of 31 March, 1942.

2. The following policy, effective 1 April, 1942, governing wages, hours of work, overtime, the employment and use of labor in the Territory of Hawaii, is announced for the information and guidance of all concerned. Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh Healey Public Contracts Act.

(a) Wages.—(1) Revised Wage Schedule No. 9, U. S. Navy Contractors, Pacific Naval Air Bases, effective 1 December, 1941, is hereby designated as the standard wage scale for workers engaged in work for Army and Navy agencies, their contractors and subcontractors. No person seeking employment with the above-mentioned employers shall be employed at a rate less than or in excess of the standard rate for the job as listed in Revised Wage Schedule No. 9, and as same may be revised from time to time, as approved by the Military Governor.

(2) The above provision, relative to wages, shall not apply to Federal or Territorial, and City and County of Honolulu Civil Service employees.

(b) Hours of Work and Overtime.—(1) Normal work-week on war projects in the Territory of Hawaii shall be six (6) days of eight (8) hours each.

(2) Overtime at the rate of one and one-half the regular rate will be paid for overtime in excess of forty-four (44) hours, or in excess of eight (8) hours in any one day. The maximum hours worked in any seven (7) consecutive days shall not exceed fifty-six (56), except in cases of emergencies and with the approval of the Chief of Military or Naval Service concerned.

(3) Work shall be so scheduled that all workers will receive one (1) day off in seven (7). This day is to be in lieu of Sunday and Sunday work per se shall not be considered overtime, and no overtime shall be paid for Sunday except when it is worked consecutively in excess of six (6) days. It is the intent of this provision to make it possible for work on war projects to be carried on seven (7) days per week, and at the same time provide that all war workers shall have one (1) day of rest out of seven (7) for the purpose of recreation and to attend to personal business.

(4) The provisions relative to hours of work and overtime shall not apply to: (a) Federal, Territorial or City and County of Honolulu civil service employees; (b) Employees of employers mentioned in paragraph 2-a above, who are in a supervisory capacity on a monthly salary basis.

(5) The provisions of any contract with individual employees, labor unions, etc., in conflict with the provisions of this order are hereby suspended.

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APPENDIX III.

Wage Schedule No. 9—(Revised—May 3, 1942)

Laborers and Mechanics.

Rules and Regulations.

1. Effective date of this revised and amplified Wage Schedule No. 9 shall be the beginning of the first pay roll period after May 3, 1942. The wage rates shown on Schedule No. 9 are to apply to all persons employed on defense projects in the Territory of Hawaii, amenable to General Order #91, whether employed locally or on the mainland. In the case of those persons employed on the mainland for work in the Territory of Hawaii, they shall be furnished with free board and lodging or, in lieu thereof, a cash payment of $45.00 per month, at the option of the employer.

2. The furnishing of free board and lodging or the cash payment to mainland workmen shall be a consideration for the necessity of maintaining a mainland home, other expenses resulting from their residence away from home, and surrendering the privileges of life in their home community.

3. As provided for in General Order #9, no person shall be employed at a rate less than, or in excess of, the rates contained in this schedule, provided that employees presently receiving rates in excess of those shown on this schedule shall not be reduced.

4. Certain persons now employed on defense projects in the Territory of Hawaii under contract from the mainland have formerly received salary or wages for loss of time

due to illness or compensable injury. Such time lost through illness or compensable injury will no longer be paid, effective the beginning of the first pay roll period after May 3, 1942. Henceforth, the only payments for loss of time shall be those to which the employee is entitled under the Defense Base extension of the Longshoremen's and Harbor Workers' Compensation Act.

5. Classifications listed under 40-hour week basis are those subject to Fair Labor Standards Act of 1938, which provides for payment on a 40-hour week basis instead of 44-hour week basis.

6. Classifications shown in second column provide for payment on a 44-hour week basis.

7. Classifications shown in third column are on a 48-hour week basis and are to be used only on those projects working on a stipulated 48-hour week, prior to April 1, 1942.

8. Payment for overtime work on all job classifications included in this schedule shall be on the basis of one and one-half times the regular rate of pay for hours worked in excess of eight hours in one day, and hours in excess of the stipulated workweek.

EXCERPTS FROM WAGE SCHEDULE NO. 9.

Revised 3 May, 1942.

LABORERS—MECHANICS

Classification	40 Hr. Wk. Base Rate	44 Hr. Wk. Base Rate	48 Hr. Wk. Base Rate
Aggregate Plant Foreman	...	$1.60	$1.65
Aggregate Plant Screenman	...	1.10	1.15
Asphalt Plant Foreman	...	1.60	1.65
Asphalt Plant Fireman	...	1.25	1.30
Barge Maintenance Foreman	$1.05	...	...
Bargeman	.75	...	...
* * * * * * *			
Shifter	...	...	1.65
Ship Foreman	1.20	...	...
Sprinkler Fitter Foreman	...	1.65	1.70
Sprinkler Fitter	...	1.45	1.50
Sprinkler Fitter Helper	...	.80	.85
Steam Fitter Foreman	...	1.65	1.70
Steam Fitter	...	1.45	1.50
Steam Fitter Helper	...	.80	.85
Stevedore	.75	...	...
Structural Steel Foreman	...	1.95	2.00
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EQUIPMENT OPERATORS

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Carrier—Lumber	.85	.90	.95
Carryall	...	1.40	1.45
Cement Gun	...	1.50	1.55
Concrete Mixer—Paving	...	1.25	1.30
Crane—¾ yd. and over	1.55	1.60	1.65
Crane—Under ¾ yd.	1.40	1.45	1.50
Crane Apprentice	.95	1.00	1.05
Crusher	...	1.10	1.15
Derrick—Land	...	1.50	1.55
Dragline—¾ yd. and over	...	1.60	1.65
Dragline—Under ¾ yd.	...	1.45	1.50
Feeder (Crusher)	...	1.10	1.15
Finishing Machine (Concrete or Asphalt)	...	1.25	1.30
Grader (Motor)	...	1.30	1.35
Grout Gun	...	1.10	1.15
Grout Mixer	...	1.10	1.15
Grout Pump	...	1.10	1.15
Gunite	...	1.50	1.55
High-lift	.85	.90	.95
Hoist Steam (1 and 2 drums)	...	1.25	1.30